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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 792

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - Appellant,

versus

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
RAILWAY LABOR EXECUTIVES' ASSOCIATION, and
ATLANTA EMPLOYEES PROTECTIVE ASSOCIATION, - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM.

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STATEMENT.

The appellant opposes and herein briefly responds to the separate motions to affirm filed by the United States and the Interstate Commerce Commission (jointly called the Government) and by Railway Labor Executives' Association (RLEA).

The Government says (page 1) that the L&N and two carriers "controlled" by L&N created the AJT.

RLEA calls these two carriers "subsidiaries" of the L&N (page 7). The characterizations are incorrect, the two carriers referred to being affiliates of the L&N.

RLEA (page 2) erroneously speaks of the AJT employees as being "adversely affected by the merger." Both the Commission (J.S. App. 31a) and the Court below (J.S. App. 13a) carefully abstained from expressing any opinion about whether or not the AJT employees had been or would be adversely affected, there being no evidence on that question and it being reserved for later decision (J.S. App. 20a) if it is reached.

RESPONSE TO THE GOVERNMENT'S MOTION.

The Government argues (page 4) that because the L&N and two of its affiliated carriers control the AJT, AJT employees are L&N employees. There is no more logic to this contention than there would be to one that because the L&N owns a one-third interest in another corporation, the employees of the latter are automatically L&N employees. The "association veil" is no more to be pierced than is the "corporate veil," in view of the fact that Section 1(3)(a) places carriers which are associations (such as the AJT) on a parity with carriers which are corporations.

Contrary to the Government's assertion (page 4), the appellant relies on no "formalistic theory" in urging as it does that the AJT cannot, at one and the same time, both be a carrier and an employer and not be a carrier and an employer. This is not formalism; it is the plainest of good sense.

The Government urges (page 5) that "[w]hile for some regulatory purposes it may be convenient to regard AJT as a carrier or employer in its own right, that should not be allowed to obscure the undeniable fact that ultimate control of the employment relationship lies with the parent carriers." Status as a carrier or an employer is not determined by what is "convenient" but according to the rules of law. At issue in this case is action of the Commission under but one statute, Section 5(2)(f) of the Interstate Commerce Act. There is but one definition of a carrier applicable to that statute, and it is the one in Section 1(3)(a), which says that an association which does what a carrier does is to be considered a carrier. The fact that carriers A, B and C control carrier D is of itself not at all persuasive that D's employees are also the employees of A, B and C.

Chaos is the only word to describe the results of the ruling herein, which changes AJT employees from their fifty-year status of sole employees of Atlanta Joint Terminals into that of employees of four distinct common carriers—AJT, L&N, Georgia Railroad and A&WP. AJT employees may claim bargaining rights against each of the four, and similar claims may be made by the employees of every other terminal company throughout the nation. This Court should not permit such disruption of established employment relationships.

At page 5 the Government cites *Walling* v. *Western Weighing & Inspection Bureau*, 160 F. 2d 47 (CA-7, 1946), and *McComb* v. *Southern Weighing & Inspec-*

tion Bureau, 170 F. 2d 526 (CA-4, 1948), in each of which it was held that the inspection bureau there involved was not an entity in its own right but a mere department of the member railroads. Neither case followed the hybrid entity-aggregate theory erroneously followed in the case at bar. *Walling* was most explicit on the point that the bureau was *not* an entity but only the aggregate of its creators, the appellate court having affirmed the lower court in its conclusion thus stated (160 F. 2d 48): "I conclude that the employees, the subject of the complaint filed herein, are not employees of the defendant, but are joint employees of the various railroads comprising the defendant." In the present case, the Government's position is that the AJT is both an entity and an aggregate; and that although the AJT is an employer of its own employees, the L&N and the other two carriers which formed the AJT are also employers of those same workers. In so saying it ignores the fact shown of record (J.S. App. 25a, Tr. 77-78) that these employees treated L&N as a foreign road or carrier in demanding and receiving penalty wages when performing services on L&N tracks.

With regard to the case of *Railway Labor Executives Association* v. *United States,* 216 F. Supp. 101 (E.D. Va., 1963), also cited by the Government on page 5, the Main Street Station was not a separately operated common carrier, whereas the AJT *is* a separately operated common carrier and is conceded by the Government to be such.

RESPONSE TO RLEA'S MOTION.

RLEA says (page 8) that the appellant does not dispute certain facts which it lists. This is not true. For example, the appellant established that there has been an evolution away from the concept of the 1907 agreement,[1] which referred to the AJT employees as joint or common employees of the carriers which formed the AJT. RLEA and the labor unions it represents have been among the efficient causes of that evolution. Appellant showed, also, that how suit is brought by or against an association in Georgia is governed by the requirements of Georgia law, whereas how an association is treated under the Interstate Commerce Act is governed by Section 1(3)(a) of that Act.

In going back and arguing about these evidentiary matters, RLEA ignores the present posture of this case: The Government has conceded that the AJT is an entity, a carrier, and an employer in its own right; and what this appellant is complaining about is the simultaneous treatment of AJT as if it did not exist—as if it were just the L&N and the other two carriers which created and control it. Thus, the appellant's attack is not, as RLEA says (page 9), against the weight the Commission attached to the evidence; it is against the erroneous legal conclusion which the Commission reached.

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[1]The 1907 agreement was entered into long prior to the enactment of Section 1(3)(a) of the Interstate Commerce Act, which recognizes associations as entities.

RLEA is in error when it says (page 10) that the Commission's treatment of the AJT employees is consistent with the decisions of Federal courts in the *McComb* and *Walling* cases (noticed in the previous section hereof) and in *United States* v. *Pacific Electric Railway Co.*, 157 F. 2d 902 (CA-9, 1946). The *Pacific Electric* case simply followed the aggregate theory of associations, the Court specifically holding that Los Angeles Motor Coach Lines "was not a legal entity, but was merely a joint activity of appellee and Los Angeles Railway" (157 F. 2d 905). Here, the Government concedes, in pleading and brief, that the AJT is an entity, a carrier, an employer.

Neither RLEA nor the Government has cited a single authority in which an association has been treated, in the same case, as both a legal entity and the mere aggregate of its creators. It is the logical fallacy of that dual treatment which appellant complains of.

RLEA argues (pages 10-12) that even if the AJT employees are not employees of the L&N, Section 5(2)(f) authorizes or requires protection of railroad employees of carriers not participants in the merger transaction; and RLEA argues that the District Court's decision can be affirmed on that separate ground. There are at least two things wrong with that argument: The first is that under the rule of the *Chenery* cases (318 U. S. 80, 332 U. S. 194) the grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based. In this case the Commission made it abundantly clear that the only ground upon which it

acted was its conclusion that the AJT employees were L&N employees. It pointed out (J.S. App. 30a) that it has consistently interpreted Section 5(2)(f) as not requiring it to impose protective conditions for the benefit of employees of a carrier which is not an applicant or participant in the transaction before it for approval. The Commission cited (J.S. App. 30a) two of its decisions giving this same interpretation, one of which was handed down twenty years ago.[1]

A second reason why Section 5(2)(f) cannot be interpreted as protecting employees of a carrier not a participant in a merger transaction is that the accepted interpretation of the statute and its legislative history show that the first sentence of the section[2] was intended to afford protection such as is provided by the Washington Job Protection Agreement[3]; and that agreement applies only to employees of "carriers involved in a particular coordination".[4]

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[1]Cf. *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U. S. 169 (1961), at 179: ". . . we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years . . ."

[2]It is upon the first sentence that RLEA bases its argument (p. 12). The second sentence of Section 5(2)(f) simply provides for a minimum protective period (*Railway Labor Executives' Association* v. *United States*, 339 U. S. 142, 155 (1950)).

[3]"Those portions of the Committee's final report pertaining to employee protection urged codification of the Washington Agreement and a bill drafted along those lines, S. 2009, was passed by the Senate in 1939. 84 Cong. Rec. 6158. The Senate bill contained language identical to that now found in the first sentence of §5(2)-(f) . . ." *Maintenance of Way* case, *supra*, 366 U. S. at 173-174.

[4]Section 6(a). The Agreement is a part of the record herein (Ex. R-3, Sheets 53-71).

RLEA says (pages 10-11) that the District Court for Eastern Virginia held in *Railway Labor Executives' Association* v. *United States,* 216 F. Supp. 101, that Section 5(2)(f) provides protection for "railroad employees affected" by the transaction without regard to whether their employer is a carrier which is a party to the transaction. Not so. As the District Court for Eastern Virginia itself told RLEA in the later case of *Railway Labor Executives' Association* v. *United States,* 226 F. Supp. 521,[1] at 525, "Our ruling in that case cannot be so construed." The Court held in the second case that the Central of Georgia's withdrawal from the Frisco's Birmingham yard may have been an economic loss to Frisco "and some of Frisco's employees may have been affected as a result thereof, but the withdrawal does not sufficiently touch the transaction here under discussion to warrant 5(2)(f) protection" (page 525).

RLEA's next argument (pages 13-14), that the appellant is estopped from contesting the Commission's ruling as to the AJT employees, overlooks the fact that it was the Commission itself which reopened the proceeding and made the new order, as it was empowered to do by Section 5(9) of the Interstate Commerce Act. The attack made by the appellant is direct, not collateral—action which the appellant was clearly entitled to take. If RLEA had desired to attack the jurisdiction of the Commission to issue the reopening order and its subsequent order of October 26, 1961, it should have raised the question in a proper proceeding.

[1]Vacated on other grounds, 379 U. S. 199 (1964).

RLEA attempts to excuse its failure to attack the order of the Commission reopening the proceeding and the order made thereafter by arguing (page 14) that a second judgment or order "merely reaffirming a first" cannot serve as a vehicle to obtain review of the first order. The Commission's order of October 26, 1961, does not "merely affirm" its order of March 1, 1957. The 1957 order provided protection for AJT employees as employees of a carrier other than an applicant in the merger proceeding if they are adversely affected (295 ICC 457, at 501). The order of October 26, 1961, which appellant here attacks is on an entirely different basis: In it, the Commission protected the AJT employees solely on the basis that they are employees of the L&N, one of the merger applicants.

This Court has held that an administrative agency cannot be rendered powerless to perform its assigned functions by application of the judicial concept of estoppel (*Wallace Corp.* v. *N.L.R.B.*, 323 U. S. 248 (1944)).

CONCLUSION.

The motions to affirm should be denied and probable jurisdiction noted.

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